83-566

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JULIAN S. H. WEINER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Attorney for Petitioner
JULIAN S. H. WEINER.

QUESTIONS PRESENTED

1. Petitioner is the last of the Equity Funding Corporation defendants and poses the question of whether newly discovered material evidence which was wilfully or negligently withheld by the Government, and which would have substantially impeached the credibility of the Government's chief witness, requires a new trial?

2. Whether the Ninth Circuit's two irreconcilable opinions relating to the materiality and credibility impeaching impact of the newly discovered evidence calls for an exercise of this Court's power of supervision?

3. Whether the Sixth Amendment right to confrontation and cross-examination includes the right to effectively cross-examine one's chief accuser concerning "deals" he has made with civil

plaintiffs which required him to testify in the criminal trial and relieved him from enormous civil liability, among other things?

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PETITION FOR WRIT OF CERTIORARI
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FOR THE NINTH CIRCUIT

RICHARD H. KIRSCHNER, on behalf of JULIAN S. H. WEINER, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals in the direct appeal is United States v. Weiner, 578 F.2d 757 (9th Cir. 1978). The Ninth Circuit's collateral and inconsistent decisions are included in the appendices and found at:

1. Memorandum Decision in United States v. Lichtik, Nos. 79-1527 and 79-1529 (Aug. 25, 1980);
2. Memorandum Decision in United States v. Julian S. H. Weiner, Nos. 82-1282 and 82-1283 (Jan. 31, 1983);
3. Amended Memorandum Decision in United States v. Julian S. H. Weiner, Nos. 82-1282 and 82-1283 (June 1, 1983); and
4. Order in United States v. Julian S. H. Weiner, No. 82-1282 (Aug. 8, 1983).

JURISDICTION

Petitioner was convicted in the United States District Court for the Central District of California after a jury trial on various counts of securities fraud arising out of his employment as an outside accountant to the Equity Funding Corporation. In the direct appeal (578 F.2d 757), petitioner claimed that his right to exculpatory materials in connection with his prosecution was infringed by the Government's failure to disclose pretrial agreements in companion civil actions which absolved the prosecution's chief witness (Samuel Lowell) of enormous personal civil liability. The Court of Appeals found that the record on appeal did not contain any evidence of the civil pretrial agreements, or the Government's knowledge that such agreements existed.

Petitioner then moved for a new trial based on newly discovered evidence. The District Court denied the motion, and Petitioner appealed. The Ninth Circuit, by Memorandum Decision in United States v. Lichtik, Nos. 79-1527 and 79-1529 (Aug. 25, 1980), affirmed in part and remanded for an evidentiary hearing. The evidentiary hearing was directed to the petitioner's claim that one of the Government's principal witnesses at trial, Samuel Lowell (Lowell), the former controller of Equity Funding, and the Government's principal witness against petitioner, had inducements to testify against the petitioner that were known to the prosecutors but not disclosed to the Court, the jury, or defendants until one year after the trial. The Panel which ordered the evidentiary hearing agreed that if such agreements

existed, the Government had an obligation to disclose their existence to the defense. (Memorandum Decision, Aug. 25, 1980, at p. 3.) During the evidentiary hearing the existence of the agreements was firmly established. Prior to pleading guilty and before the commencement of the criminal trial, Lowell entered into settlement agreements in companion civil actions which released him from enormous personal liability in return for his cooperation in prosecuting the civil and criminal actions.

The agreements required Lowell, inter alia, to provide information concerning Equity Funding's activities "as the same relate to the pending criminal and civil proceedings," and to appear in "any other judicial. . . proceeding . . . for the [civil plaintiffs'] benefit without any claim of privilege

"whatsoever." In essence, the agreement between Lowell and Equity Funding's trustees absolved Lowell of enormous civil liability in return for his cooperation in providing information relating to "the pending criminal and civil proceedings."

The impact and affect of these agreements were the subject of Memorandum Decision, United States v. Julian S. H. Weiner, Nos. 82-1282 and 82-1283 (Jan. 31, 1983), and the Amended Memorandum Decision, United States v. Julian S. H. Weiner, Nos. 82-1282 and 82-1283 (June 1, 1983). The Memorandum Decisions came to diametrically opposed conclusions regarding the materiality of Lowell's agreements and whether or not the existence of the agreements would have undermined his credibility in the eyes of the jury. In order to correct

the error, petitioner filed a Motion to Correct Amended Memorandum and Reconsider Denial of Petition for Rehearing and Suggestion for Rehearing In Banc. This Motion was denied on August 8, 1983, and is the decision from which petitioner files this Petition.

STATEMENT

Prior to the commencement of the criminal trial, Lowell, the Government's chief witness entered into written settlement agreements in companion civil actions which released him from enormous liability in return for his cooperation in prosecuting the civil and criminal cases.

None of the defendants learned of these agreements until one year after the completion of their trial. The uncontradicted testimony of Lowell during the subsequent evidentiary hearing at

the trial court level established that he told one of the prosecutors (Rathje) prior to the completion of the criminal trial the essential terms of his "deal" with the civil litigants. (Transcript, Apr. 27, 1981, p. 94.) The prosecutors were aware, through Lowell, prior to the completion of the trial, of the favorable "deal" which he had worked out for himself with the civil litigants. Unfortunately, the prosecutors did not reveal that vital information to the defendants during the trial. Whether or not the prosecutors intentionally or negligently withheld the impeaching material is probably irrelevant according to the Ninth Circuit's analysis:

> "The proper standard in negligent non-disclosure cases should call for a new trial whenever the non-disclosed evidence might reasonably have affected the jury's judgment on some material point."

United States v. Butler, 567 F.2d 885, 890 (9th Cir. 1983).

Hence, the seminal question is whether Lowell's non-disclosed civil agreements might reasonably have affected the jury's judgment regarding his credibility. Common sense and a prior decision (Memorandum Decision, Jan. 31, 1983) of the Ninth Circuit on this precise issue cry out "yes."

The agreements required Lowell, inter alia, to provide information concerning Equity Funding's activities "as the same relate to the pending criminal and civil proceedings," and to appear in "any other judicial. . . proceeding. . . for the [civil plaintiffs'] benefit without any claim of privilege whatsoever. . .". The agreements between Lowell and Equity Funding's trustee absolved Lowell of enormous civil liability in return for

his cooperation in providing information relating to "the pending criminal and civil proceedings." The agreements were incorporated in the record during the evidentiary proceeding at the District Court level. An agreement and an affidavit from Lowell's attorney, which were submitted to the trial court, are included in the appendices. These documents illustrate and define the nature of Lowell's "deal."

In the decision of August 25, 1980, remanding the question to the trial court for an evidentiary hearing, the Panel found,

> "[We have] no difficulty at all in agreeing with the defendants that the Government had an obligation to disclose the existence of such an agreement. See, e.g., Giglio v. United States, 405 U.S. 150 (1972); United States v. Knowles, 594 F.2d 753, 755 (9th Cir. 1979); United States v. Butler, 567 F.2d 885, 889 (9th Cir. 1978); United States v.

Gerard, 491 F.2d 1300 (9th Cir. 1974)." (At p. 3.)

A new trial is required,

> "If the non-disclosure affects the credibility of a witness whose reliability might be determinative of guilt or innocence. . . The proper standard in negligent non-disclosure cases should call for a new trial wherever the non-disclosed evidence might reasonably have affected the jury's judgment on some material point, without necessarily requiring a supplementary finding that it also would have affected its verdict."
>
> United States v. Butler, supra, at 890.

The Ninth Circuit's January 31, 1983 Memorandum analyzed the civil agreements and their impact on Lowell's credibility, concluding:

> "Lowell's credibility might have been affected had the jury known of the civil agreements. . ." (Emphasis added.)
> (At p. 4.)

In support of its statement that the jury's estimate of Lowell's credibility

might have been adversely affected had they known of the civil agreements, the Court appropriately observed the manner in which Lowell would have been impeached had this knowledge been available to the defendants:

> "The defense lawyers might have explained to the jury that although Lowell's civil agreements did not explicitly require him to testify at the criminal trial, they did so implicitly because his testimony at the criminal trial would later be used by either side in the civil cases. The jury might also have been apprised of the enormous personal liability, probably not dischargeable in bankruptcy, to which Lowell was potentially exposed without the agreements. Cumulatively, this knowledge might well have affected the jury's estimation of Lowell's credibility."(Emphasis added.) (At p. 4.)

The litany of ways in which Lowell's credibility would have been further undermined by defense counsel in the eyes of the jury reads like a laundry

list of basic impeachment techniques:

1. Lowell would not have been able to escape enormous civil liability and consummate his "deal" with the civil plaintiffs unless he characterized the testimony he could offer against the remaining defendants as "highly incriminating." Hence, Lowell had to "sell" himself to the civil plaintiffs prior to striking his bargain, and this could only be done if he claimed to have had damaging testimony against the remaining defendants. If not, why deal with him? This would have been a strong motivation for Lowell to lie and would have been underscored for the jury.

2. Lowell entered into the civil agreements prior to pleading guilty in the criminal cases and prior to striking his bargain in the criminal case. The declaration (see appendices), which was

submitted to the District Court by Lowell's attorney, reveals, inter alia:

> "[The civil agreements] were reached prior to the time that arrangements were reached with the Government whereby Mr. Lowell agreed to enter guilty pleas to Counts 1, 25, 26 and 27 in Criminal Case No. 13390-JWC-CD." (Emphasis added.) (At p. 3.)

It would seem Lowell's primary concern was with the civil agreements since he consummated them prior to his agreement in the criminal case. This point would have been emphasized to the jury.

3. Lowell's agreement in the criminal case included a reduction in the number of counts to which he would plead, but did not include a promise to recommend a lenient sentence. Hence, although the jury was informed of the existence of the agreement in the criminal matter, it was not informed that he had earlier negotiated a civil agreement

which guaranteed him "lenient" treatment in the civil matters.

The January 31, 1983 Memorandum, after concluding,

> "Lowell's credibility might have been affected had the jury known of the civil agreements,"

continued on to state:

> "[But his] credibility was not a 'material point' because. . .his testimony did not directly implicate the defendants." (At p. 4.)

The latter statement was clearly incorrect and not supported by the record.[1/]

On June 1, 1983, after petitioner directed the Court's attention to the record below, which did not support the

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[1] The August 25, 1980 Memorandum, which was decided by a different Panel (Peck, Anderson and Ferguson), specifically stated,

> "Lowell, the former controller of Equity Funding, was one of the Government's principal witnesses against the defendants." (At p. 2.)

Court's position regarding lack of materiality and indirect testimony, the Court reversed itself concluding:

> "Lowell's credibility was a 'material point' for the purposes of the Butler test. . ." (At p. 6, n. 3.)

At trial, Lowell did not merely testify about the structure of the fraud, but rather about the petitioner's knowledge and participation in it. For example, Lowell testified to conversations with the petitioner about questionable transactions, including the preparation and execution of false and misleading documents. The Ninth Circuit's opinion on the direct appeal (578 F.2d 780-784) summarizes the manner in which Lowell directly implicated petitioner in the fraud. While the Government may have offered proof of a fraud through a mass of documentation and summary witnesses,

the alleged connection of this petitioner to the scheme was established principally through the testimony of Lowell.

At this juncture, after finding that Lowell's credibility was a material point, the June 1, 1983 Memorandum reverses the earlier January 31, 1983 Memorandum and underlying reasoning, without a scintilla of new evidence, by finding,

> "The existence of the civil agreements relieving Lowell of enormous liability would not have adversely affected his credibility in the eyes of the jury."
> (At p. 4.)

Contrary to common sense and its earlier well-reasoned opinion, the Court now found the existence of the civil agreements would not have adversely affected Lowell's credibility. The June 1, 1983 Amended Memorandum posits the question this way:

> "The central question, then, is whether knowledge of the existence of the civil agreements would reasonably have affected the jury's judgment of Lowell's credibility 3/, in light of their knowledge of the existence of an agreement in the criminal trial. 4/ We believe that it would not. If such knowledge would have had an impact at all, it would have served to bolster Lowell's credibility, not to undermine it.5/"

Footnote 5 provides:

> "The civil agreements, by freeing Lowell from potential monetary liability, removed an incentive he might have had to misrepresent his own involvement in and knowledge of wrongdoing."

Lowell was indicted on numerous counts of securities violations and, in return for reduced counts, plead guilty and agreed to testify extensively at petitioner's trial. 2/ Prior 3/ to

---

2 Contrary to the January 31, 1983 Memorandum, the Government did not "promise to recommend a lenient sentence" in return for Lowell's testimony.
See fn. 3, at p. 19, infra.

pleading guilty and before the commencement of the criminal trial, Lowell entered into settlement agreements in the companion civil actions.

The conclusion that the existence of Lowell's civil agreements would not only have not impeached his credibility, but would have bolstered his credibility is ridiculous. The conclusion is not supported by the record below and is contrary to the Court's own finding expressed in the January 31, 1983 Memorandum.

Lowell's credibility clearly would have been adversely impacted had the jury known that he consummated his civil

---

[3] Contrary to the Court's January 31, 1983 Memorandum, Lowell did not enter into civil settlement agreements "shortly after pleading guilty." This occurred prior to pleading guilty. However, the Government did not learn of the civil agreements until shortly after the criminal trial had commenced.

"deal" prior to his criminal "deal"; that his criminal "deal" did not involve a potential recommendation of leniency, whereas his civil "deal" actually guaranteed lenient treatment for him in the civil agreements; and that, in order to induce the civil plaintiffs to enter into agreements with him freeing him from potential enormous non-bankruptcy dischargeable monetary liability, he did have an incentive to misrepresent his own involvement and exaggerate the involvement and wrongdoing of others, including petitioner. At the trial, Lowell testified about the petitioner's knowledge and participation in the fraud. This was the central issue for the jury. Therefore, Lowell's credibility was crucial to petitioner's defense. Petitioner has been deprived of the opportunity to present this critical

evidence to the jury and thus denied his Sixth Amendment rights and the right to due process of law.

CONCLUSION

In its January 31, 1983 Memorandum, the Ninth Circuit recognized that Lowell's credibility was affected by the withheld information. Backed by persuasive reasoning, the Court acknowledged that Lowell's "credibility before the jury might have been affected had they known of the civil agreements."

Not only was Lowell's credibility an important issue to the defense, it was the critical issue for the defense. To find the civil agreements, in light of the record, bolstered Lowell's credibility ignores the potential use of such materials by skilled defense counsel, the Court's own reasoning in its January 31, 1983 Memorandum, and would

amount to a gross miscarriage of justice.

Respectfully submitted,

RICHARD H. KIRSCHNER,
A Professional Corporation,

By Richard H. Kirschner, Esq.

Attorney for Petitioner
JULIAN S. H. WEINER.

APPENDIX A

LAW OFFICES
STEPHEN D. MILLER
Incorporated
8912 West Olympic Boulevard
Beverly Hills, CA. 90211
(213) 858-8282

Attorneys for _____

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
MARVIN A. LICHTIG, JULIAN S. WEINER, SOLOMON BLOCK,	)
	)
Defendants.	)
	)

NO. CR 13390-JWC

DECLARATION OF STEPHEN D. MILLER

I, STEPHEN D. MILLER, declare as follows:

1. I am an attorney at law, licensed to practice before all of the

EXHIBIT B

courts of the State of California and admitted to practice before the United States District Court for the Central District of California.

2. During the years 1974 and 1975, I was a principal of the Law Firm of Miller, Glassman & Browning, Inc. J. Kent Steele, Esq., was also a principal of that firm. Mr. Steele and I represented Samuel B. Lowell, a Defendant in a criminal prosecution entitled United States v. Stanley Goldblum, No. 13390-JWC-CD, United States District Court for the Central District of California. Mr. Steele and I represented Mr. Lowell during the course of the Government's investigation which preceded his Indictment up until the time that Mr. Lowell was sentenced on March 24, 1975. The sentencing followed the entry of guilty pleas to Counts 1, 25, 26, and 27, on

September 30, 1974.

3. In about October, 1974, Mr. Steele and I entered into negotiations with Counsel for Plaintiffs in the case of In Re Equity Funding Corporation of America Securities Litigation, No. 73 Civ. 1374 et al., M.D.L. 142. An agreement was reached with Counsel for Plaintiffs in the M.D.L. 142 litigation. The agreement provided, among other things, for Mr. Lowell to provide information to counsel for the Plaintiffs in said litigation and otherwise to cooperate with Counsel for Plaintiffs in the prosecution of their claims.

4. In or about October, 1974, Mr. Steele and I negotiated with Counsel to the Trustee in proceedings entitled In Re the Matter of Equity Funding Corporation of America, Debtor, Case No. 73-03468, pending in the United States

District Court for the Central District of California. An agreement was reached with Counsel for the Trustee whereby Mr. Lowell would provide information to the Trustee and in other ways cooperate with the Trustee in the prosecution of claims asserted in said litigation before the Court.

5. The agreements referred to in paragraphs 3 and 4 hereof were reached prior to the time that arrangements were reached with the Government whereby Mr. Lowell agreed to enter guilty pleas to Counts 1, 25, 26, and 27, in Criminal Case No. 13390-JWC-CD.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this 19th day of April, 1981, at Beverly Hills, California.

s/ Stephen D. Miller
STEPHEN D. MILLER

APPENDIX B

LAW OFFICES OF
SCHWARTZ, ALSCHULER & GROSSMAN
1880 Century Park East, Suite 1212
Century City
Los Angeles, California 90067

October 3, 1974

Steven D. Miller, Esq.
Miller, Glassman & Browning, Esqs.
360 N. Bedford Drive
Beverly Hills, California 90210

Re: Equity Funding Litigation -
Sam Lowell

Gentlemen:

The purpose of this letter is to confirm the agreement reached between our respective firms in connection with the Equity Funding class actions now pending before the Honorable Malcolm M. Lucas in the Central District of California, as follows:

1. I am Liaison Counsel on behalf of the plaintiffs in class actions now pending before Judge Lucas (the MDL proceedings);

2. You represent Sam Lowell, a defendant in various criminal and civil proceedings;

3. Lowell has indicated a desire to cooperate with us in the prosecution of the MDL proceedings by way of discussing with us and furnishing to us the information he has concerning the

activities of Equity Funding Corporation and its subsidiaries, as the same relate to the pending criminal and civil proceedings including, but not limited to, the furnishing to us of all documents in his possession or under his control and the meeting with us now, and such time during the pendency of the litigation as may be reasonably required, for the purpose of placing us in possession of pertinent facts, knowledge, information and belief;

4. Lowell has represented that he does not have the financial means sufficient to satisfy any judgment which might be reasonably entered against him in the MDL proceedings and he has agreed to forthwith furnish us with a financial statement representing his true assets and liabilities. He represents that his net worth is no greater than $30,000;

5. We are prepared to request that all class action litigation be dismissed as to Lowell in the event of any settlement in favor of Equity Funding Corporation of America, its subsidiaries, or its officers and directors. We would urge to the Court that such actions be dismissed in Lowell's favor without any consideration other than that recited in this letter by reason of Lowell's cooperation with us in the prosecution of the class action litigation. The settlement or dismissal of class action suits is always subject to Court approval. If the litigation is not so settled, and the case or cases proceed to trial, we would move the Court for an order enforcing against the plaintiffs and the

classes they represent a covenant not to levy any execution against Lowell on any judgment which might be entered against Lowell or to record any abstracts of judgment in connection with the same;

6. Neither our office nor any other firm in connection with the MDL proceedings relating to class action has any direction or control over the individual actions now pending against Lowell or which may hereafter be filed against Lowell. We will use our best efforts to apprise individual plaintiffs of Lowell's cooperation and urge upon them to enter into similar agreements with Lowell. However, we make no assurances or representations that we will be successful in any such effort as we have no direction, power, control or influence over those actions. Thus, Lowell runs the risk of liability in any and all private actions;

7. Lowell has also agreed that he will appear in court in any other judicial or quasi-judicial proceedings or in lawyers' offices for the purpose of giving statements to us or for our benefit without any claim of privilege whatsoever;

8. I understand that it is your desire that I, or my designee, personally appear at the time of sentencing of Lowell in connection with any pleas of guilty which may be entered against him for the purpose of informing the Court of this agreement and apprising the Court of the degree of cooperation which Lowell has furnished hereunder.

I have agreed to do so with the express understanding that I shall be a reporter of fact only and I shall not encourage nor recommend any particular disposition of any action pending against Lowell. Furthermore, I am to be reimbursed and compensated for all out-of-pocket expenses and for my time at my prevailing hourly rate in connection with any such appearances. These payments, which are to be made in advance, shall not establish any form of attorney-client relationship whatsoever between this firm and Lowell nor is there any.

If the foregoing adequately and accurately confirms the spirit and substance of our understanding, then would you please be kind enough to have Lowell execute the same and execute the same with respect to your approval as to form.

Yours very truly,

MARSHALL B. GROSSMAN

MBG:fb

AGREED AND ACCEPTED:

s/ Samuel Lowell
Samuel Lowell

APPROVED AS TO FORM:

MILLER, GROSSMAN & BROWNING, INC.

By s/ Stephen D. Miller

APPENDIX C

FILED
Aug. 25, 1980
Richard H. Deane
Clerk, U.S. Court
of Appeals

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. MARVIN A. LICHTIG, JULIAN S.H. WEINER, and SOLOMON BLOCK, Defendant-Appellants.	Nos. 79-1527 & 79-1529 D.C. Nos. CR 13390-17/ 18/19-JWC MEMORANDUM

On Appeal from the United States District Court for the Central District of California

The Honorable Jesse W. Curtis, Presiding

Submitted March 5, 1980

Before: PECK,* ANDERSON, and FERGUSON, Circuit Judges

The defendants, Lichtig, Weiner, and Block, were the outside accountants to the Equity Funding Corporation of America. Following a lengthy trial, they were all convicted on various criminal counts of securities fraud. After they had unsuccessfully sought relief on direct appeal, all three defendants joined in this motion for a new trial based on newly-discovered evidence. This appeal was taken after the district court denied their motion. We affirm in part and remand for an evidentiary hearing on one of the questions raised by the defendants.

The events which led to the prosecution and conviction of the defendants were thoroughly explained in this

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* The Honorable John W. Beck, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

court's prior opinion on direct appeal, United States v. Weiner, 578 F.2d 757 (9th Cir. 1978), cert.denied, 439 U.S. 981, 99 S.Ct. 568, 58 L.Ed.2d 651. Because of this, we will only briefly explain the facts surrounding the defendants' claims of error as they become relevant to the issues which are raised.

On appeal, the defendants offer five different arguments as to why they should be granted a new trial. The first three arguments are based on newly-discovered evidence relating to: (1) the failure to disclose the Lowell (an important prosecution witness) agreement with the trustee in bankruptcy; (2) the failure to disclose exculpatory statements made by Lowell; and (3) Goldblum's (the former president of Equity Funding) assertion that the defendants were not involved in the fraud. In addition,

the defendants raise arguments about: (4) the failure to grant immunity to Goldblum; and (5) the railure to release the SEC transcripts. We discuss these seriatim.

Prior to considering the defendant's arguments, we note that our review of the denial of a new trial motion is extremely limited. This court will not disturb a district court's denial of a new trial motion unless the district court has abused its broad discretion. See United States v. Elred, 588 F.2d 746, 753 (9th Cir. 1978); United States v. Cervantes, 542 F.2d 773, 779 (9th Cir. 1976); United States v. Harris, 534 F.2d 1371, 1373 (9th Cir. 1976), cert. denied, 429 U.S. 847, 97 S.Ct. 132, 50 L.Ed.2d 120.

1. The Lowell Agreement

Lowell, the former controller of

Equity Funding, was one of the government's principal witnesses against the defendants. Shortly after Lowell pled guilty to the charges against him, and four months prior to the trial in the present case, Lowell had entered into a settlement agreement in a companion civil action. The agreement between Lowell and Equity Funding's trustee in reorganization absolved Lowell of all civil liability in return for his cooperation in providing information relating to "the pending criminal and civil proceedings." The defendants did not learn of this agreement until a year after the completion of their trial.

Not only do the defendants claim that this agreement as "newly-discovered evidence" justifies a new trial, but they also claim that the government had

a duty to disclose the existence of such an agreement. We have no difficulty at all in agreeing with the defendants that the government had an obligation to disclose the existence of such an agreement. See, e.g., Giglio v. United States, 405 U.S. 150, 154-155, 92 S.Ct. 763, 31 L.Ed. 2d 104 (1972); United States v. Knowles, 594 F.2d 753, 755-756 (9th Cir. 1979); United States v. Butler, 567 F.2d 885, 889-890 (9th Cir. 1978); United States v. Gerard, 491 F.2d 1300, 1302-1304 (9th Cir. 1974).

The government makes several short arguments as to why the Lowell agreement cannot justify a new trial. None of these are persuasive.

The government claims that there was no evidence that the government's trial attorneys had knowledge of the Lowell agreement. This claim at this stage of

the proceedings is unpersuasive. After all, the question of whether the trial attorneys had knowledge of the agreement is a matter which is exclusively within the government's power to answer. Instead, the government has never bothered to either admit or deny such knowledge. If anything, this delay creates an inference that the government's trial attorneys did have knowledge.

Moreover, contrary to the government's assertion, the record does contain affirmative evidence which indicates that the trial attorneys did have knowledge of the Lowell agreement prior to the defendants' trial. See the DeSantis affidavit in the record excerpt. In addition, since the terms of the agreement clearly contemplated that Lowell would testify in the criminal proceedings, the only inference which

can be drawn in the face of the government's stonewalling is that the trial attorneys not only had knowledge of, but also participated in, the formation of the Lowell agreement.

The government argues that the agreement was between Lowell and the reoganization trustee who was neither an officer, agent, or employee of the United States. Therefore, according to the government, the agreement was immaterial. While it may be true that the agreement had no bearing on Lowell's testimony at the defendants' trial, with the present state of the record, we must reject this argument. If there was no relationship between the trustee's agreement and the criminal proceedings, then why would the agreement expressly provide for Lowell's participation in the criminal proceedings? This simply cannot be answered

without an evidentiary hearing.

The Government also claims that the requirements for granting a new trial based on newly-discovered evidence are not satisfied by this evidence. This argument is legally incorrect. These requirements generally apply when a defendant moves for a new trial based on newly-discovered evidence. They do not apply when the newly-discovered evidence was evidence that the government either negligently or willfully withheld from the defendant. See Knowles, supra, 594 F.2d at 755-756; Butler, supra, 567 F. 2d at 890-891.

> "The proper standard in negligent non-disclosure cases should call for a new trial whenever the nondisclosed evidence might reasonably have affected the jury's judgment on some material point, without necessarily requiring a supplementary finding that it also would have affected its verdict."

Butler, supra, 567 F.2d at 890.

The district court also found that any error in depriving the defendants of the impeaching value of this evidence was harmless beyond a reasonable doubt. While we are not prepared to overrule this finding, we, nevertheless, believe that the district court abused its discretion by not conducting an evidentiary hearing as provided for in DeMarco v. United States, 415 U.S. 449, 94 S.Ct. 1185, 39 L.Ed.2d 501 (1974). See United States v. Ramirez, 608 F.2d 1261, 1267 (9th Cir. 1979). There are too many unanswered questions for this error to be summarily dismissed, at this point, with a finding of harmless error. Were the government's trial attorneys involved in the formation of the agreement between Lowell and the reorganization trustee? If so, what was the nature of their role? Why did the government's

trial attorneys not respond at trial when the court asked about the possible existence of such an agreement? It is only after these and other questions about the extent and nature of the government's participation in the formation of, and concealment of, the Lowell agreement are answered, that this court will be ready to decide whether the error was harmless.

We, therefore, must vacate the district court's denial of the defendants' motion for a new trial, and remand for an evidentiary hearing on this one issue. Only after the extent of the error, if there was any, is determined, will this court consider whether the error was harmless.

2. The Lowell Statements

Lowell has made some statements which tend to exculpate the defendants.

These are presented to the court in the form of an affidavit signed by Lowell which contains evidence favorable to Weiner. And there is also an affidavit signed by Goldblum which repeats statements that Lowell made to Goldblum. The gist of these statements (under the broad interpretation given to them by the defendants) is that Lowell did not believe that the defendants were involved in the fraud, and if he had been asked about it at trial, he would have testified to that effect. Apparently, Lowell told this to one of the government attorneys during trial (at least about Weiner).

These statements were not a sufficient ground for granting a new trial. A defendant who moves for a new trial on the basis of newly-discovered evidence must show, among other things,

that the new evidence could not have been obtained with due diligence and the new evidence would probably produce an acquittal on retrial. United States v. Krasny, 607 F.2d 840, 843 (9th Cir. 1979), cert. denied, __ U.S. __, 100 S. Ct. 1337, 63 L.Ed.2d 775; Elred, supra, 588 F.2d at 753. With any amount of diligence, the defendants could have discovered this "evidence." After all, Lowell himself states that, if asked, he would have testified to this effect at trial. Moreover, Lowell's statements consist of little more than his personal opinion about the innocence of the defendants. Lowell does not dispute any fact in evidence nor recant any of his testimony. Although Lowell is entitled to have his own opinions as to the guilt or innocence of the defendants, they did not form a sufficient basis for granting

a new trial. Likewise, the mere fact that Lowell may have told his opinion to the government's attorney did not give rise to any duty of disclosure.

3. The Goldblum Assertions

Goldblum, the former chief executive officer of Equity Funding, and the chief architect of the fraud, claimed his Fifth Amendment privilege and refused to testify at the defendant's trial. However, since that time, Goldblum has given several depositions where he has testified that the defendants had no knowledge of the fraud. In addition, Goldblum has signed an affidavit which alleges that the defendants were not involved in the fraud.

We recognize that Goldblum's testimony may have been helpful to the defendants. Nevertheless, it was not a sufficient ground for granting a new

trial. As we pointed out earlier, the newly-discovered evidence must be of such a character that it would probably produce an acquittal on retrial. See, Krasny, supra, 607 F.2d at 843; Eldred, supra, 588 F.2d at 753. This court reviewed the sufficiency of the evidence against the defendants during their direct appeal. See Weiner, supra, 578 F.2d at 776-785. We do not believe that Goldblum's conclusory assertions would probably refute the substantial body of evidence which we reviewed there. Since this evidence probably would not produce an acquittal on retrial, it cannot afford a basis for granting a new trial.

4. Failure to Grant Immunity to Goldblum

Block raises the argument that either the government, or the court, should have granted immunity to Goldblum so that he could have testified on their behalf.

This court has already rejected as "meritless" the contention that the government was obliged to grant immunity to Goldblum. Weiner, supra, 578 F.2d at 771 n. 12. The claim that the court had an obligation, or even had the power, to grant immunity is also "meritless." See United States v. Richardson, 588 F. 2d 1235, 1241 (9th Cir. 1978), cert. denied, 440 U.S. 947, 99 S.Ct. 1426, 59 L.Ed.2d 636 ("court has no power to make such a grant"); United States v. Benveniste, 564 F.2d 335, 339 n.4 (9th Cir. 1977) ("The trial court has no power to grant immunity to a witness whose testimony the defendant may wish to offer").

5. The SEC Transcripts

The defendants claim that certain SEC transcripts exculpated them and that this should have been turned over as

Brady material. We rejected this identical argument once before. Weiner, supra, 578 F.2d at 767. The defendants offer no reason why we should reconsider our prior rejection of this argument.

CONCLUSION

Based on the preceding discussion, we affirm the district court's rejection of the defendants' arguments relating to the Lowell statements, the Goldblum assertions, Goldblum immunity, and the SEC transcripts. We vacate the district court's denial of the new trial order so that an evidentiary hearing may be held on the Lowell agreement.

SO ORDERED.

APPENDIX D

FILED
Jan. 31, 1983
Phillip B. Winberry
Clerk, U.S. Court
of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JULIAN S.H. WEINER, and SOLOMON BLOCK, Defendants-Appellants,	NO.82-1282 D.C. NOS. CR 13390-17 & 19-JWC
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. MARVIN A. LICHTIG, Defendant-Appellant.	NO.82-1283 D.C. NO. CR 13390-18-JWC MEMORANDUM

Appeal from the United States
District Court for the Central
District of California

Honorable Jesse W. Curtis,
Judge Presiding

Argued and Submitted January 5, 1983

Before: SKOPIL, NELSON, and CANBY,
Circuit Judges.

Defendants were outside accountants to the Equity Funding Corporation. Following a lengthy trial, they were convicted on various criminal counts of securities fraud. [1/] Defendants appeal the denial of their motion for new trial based on newly-discovered evidence.

Appellants claim that one of the government's principal witnesses at trial, Lowell, had inducements to testify against the defendants that were known to the prosecutors but not disclosed to the court, jury, or defendants. Lowell was the former controller of Equity Funding, and himself indicted on numerous counts of securities violations.

In return for reduced counts and a promise to recommend a lenient sentence,[2/] Lowell pleaded guilty and agreed to testify extensively at defendants' trial. Shortly after pleading guilty but before the trial, Lowell entered into settlement agreements in companion civil actions which released him from liability in return for his cooperation in prosecuting the civil actions. The agreements required Lowell, inter alia, to provide information concerning Equity Funding's activities "as the same relate to the pending criminal and civil proceedings," and to appear in "any other judicial. . . proceeding. . . for [the civil plaintiffs'] benefit without any claim of privilege whatsoever." The agreements laid the groundwork for Lowell to be relieved from potentially enormous civil liability to class action

plaintiffs and the trustee in Equity Funding's bankruptcy. Defendants did not learn of these agreements until after the trial.

Appellants claim that the prosecutors knew of the agreements during trial and impermissibly failed to disclose their existence. The question is whether the prosecutors' non-disclosure of the agreement requires a new trial.

Appellants contend that the prosecutors' non-disclosure in this case was willful and intentional. We find nothing in the record to show intentional non-disclosure. The record shows that the prosecutors knew Lowell had agreements with the civil litigants which required his full cooperation and assistance. The district court found that the prosecutors did not participate in the negotiation of these agreements, nor

were tyey aware of their exact terms prior to completion of the trial. While it is true that the trial judge asked about the disposition of Lowell's civil suits and got no reply whatsoever, the prosecutors' failure to answer the judge's question cannot be characterized as willful. The trial judge's question came during a dialogue with defense counsel regarding the relevance of the civil allegations and damages sought against Lowell. The defense counsel continued arguing relevancy immediately after the judge asked about the settlements; the judge's question was lost in the argument and went unanswered.

We enunciated the appropriate test for this case in United States v. Butler, 567 F.2d 885 (9th Cir. 1978):

> The proper standard in negligent nondisclosure cases should call for a new trial wherever the

> nondisclosed evidence might reasonably have affected the jury's judgment on some material point.

567 F.2d 890. If the non-disclosure affects the credibility of a witness whose reliability might be determinative of guilt or innocence, a new trial is required. Giglio v. United States, 405 U.S. 150, 154 (1972), Napue v. Illinois, 360 U.S. 264 (1959), United States v. Butler, 567 F.2d at 890.

It is reasonable to assume that the jurors' estimate of Lowell's credibility might have been affected had they known of the civil agreements. The defense lawyers might have explained to the jury that although Lowell's civil agreements did not explicitly require him to testify at the criminal trial, they did so implicitly because his testimony at the criminal trial could later be used by either side in the civil cases. The jury might

also have been apprised of the enormous personal liability, probably not dischargeable in bankruptcy, to which Lowell was potentially exposed without the agreements. Cumulatively, this knowledge might well have affected the jury's estimation of Lowell's credibility.

However, Lowell's credibility was not a "material point." The trial judge found that "Mr. Lowell's credibility was not in issue," because he testified regarding "the structure of the fraud, . . . evidence which was generally admitted by all and questioned by none," and because his testimony did not directly implicate the defendants.

Appellants have shown nothing to contradict the judge's finding. They state without citation to the record that Lowell "implicated Mr. Lichtig by way of approximately fifty references in

"his testimony." They cite the government's sentencing memorandum regarding Lowell and this court's opinion in United States v. Weiner, 578 F.2d 757 (9th Cir.), cert. denied, 439 U.S. 981 (1978), to show that Lowell was an important witness to explain the structure of the fraud. This does not show that Lowell's credibility was materially in issue.

In an appeal from the denial of a motion for new trial based on newly-discovered evidence, a significant burden rests on the appellants to show that the trial judge abused his discretion in denying the motion. United States v. Brashier, 548 F.2d 1315, 1327 (9th Cir. 1976), cert. denied, 429 U.S. 1111 (1977). Appellants have not cited any evidence to show that the trial judge's findings were unsupported by the evidence

or that the findings did not support denial of a new trial under the Butler standard. Appellants have not shown an abuse of discretion.

Accordingly, the denial of the motion for new trial based on newly-discovered evidence is

AFFIRMED.

FOOTNOTES

1/ Defendants unsuccessfully sought relief on direct appeal, United States v. Weiner, 578 F.2d 757 (9th Cir.), cert. denied, 439 U.S. 981 (1978). Then, defendants moved for a new trial based on newly-discovered evidence. The district court denied the motion, and defendants appealed. This court, by Memorandum Decision in United States v. Lichtig, Nos. 79-1527 and 79-1529 (August 25, 1980), affirmed in part and remanded for an evidentiary hearing on one of the questions raised. After a full evidentiary hearing, the district court once again denied the motion for new trial. Defendants appeal.

2/ The jury was fully apprised of these inducements for Lowell's testimony.

APPENDIX E

FILED
Jun 1, 1983
Phillip B. Winberry
Clerk, U.S. Court
of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JULIAN S.H. WEINER, and SOLOMON BLOCK, Defendants-Appellants.	NO. 82-1282 D.C. NOS. CR 13390-17 & 19-JWC
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. MARVIN A. LICHTIG, Defendant-Appellant.	NO. 82-1283 D.C. NO. CR 13390-18- JWC AMENDED MEMORANDUM AND DENIAL OF PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

Appeal from the United States
District Court for the Central
District of California

Honorable Jesse W. Curtis,
District Judge, Presiding

Argued and Submitted: January 5, 1983

Before: SKOPIL, NELSON, and CANBY,
Circuit Judges.

Defendants were outside accountants to the Equity Funding Corporation. Following a lengthy trial, they were convicted on various criminal counts of securities fraud.[1/] Defendants appeal the denial of their motion for new trial based on newly-discovered evidence. We affirm.

Samuel Lowell, the former controller of Equity Funding and one of the government's principal witnesses at trial, was himself indicted on numerous counts of securities violations. In return for reduced counts and a promise to

recommend a lenient sentence, Lowell pleaded guilty and agreed to testify extensively at defendants' trial. The jury was fully apprised of these inducements for Lowell's testimony. Before the trial, shortly after pleading guilty, Lowell entered into settlement agreements in companion civil actions which released him from liability in return for his cooperation in prosecuting the civil actions. [2/] These civil agreements laid the groundwork for Lowell to be relieved from potentially enormous civil liability to class action plaintiffs and the trustee in Equity Funding's bankruptcy. Defendants did not learn of these agreements until after the trial.

Appellants claim that the prosecutors knew of the civil agreements during the trial and impermissibly failed to disclose their existence. Appellants

assert that the prosecutors' nondisclosure of these agreements requires a new trial.

A motion for a new trial based on newly-discovered evidence is addressed to the trial court's sound discretion. United States v. Krasny, 607 F.2d 840, 845 (9th Cir. 1979), cert. denied, 445 U.S. 942 (1980). A significant burden rests on the appellants to show that the trial judge abused his discretion in denying the motion. United States v. Brashier, 548 F.2d 1315, 1327 (9th Cir. 1978), cert. denied, 429 U.S. 1111 (1977).

Appellants contend that the prosecutors' nondisclosure in this case was willful and intentional. We find nothing in the record to show intentional nondisclosure. The record shows that the prosecutors did know Lowell had

agreements with the civil litigants which required his full cooperation and assistance. However, the district court found that the prosecutors did not participate in the negotiation of these agreements, nor were they aware of their exact terms prior to completion of the trial. While it is true that the trial judge asked about the disposition of Lowell's civil suits and got no reply whatsoever, the prosecutors' failure to answer the judge's question cannot be characterized as willful. The trial judge's question came during a dialogue with defense counsel regarding the relevance of the civil allegations and damages sought against Lowell. The defense counsel continued arguing relevancy immediately after the judge asked about the settlements; the judge's question was lost in the argument and went

unanswered.

As we enunciated in United States v. Butler, 567 F.2d 885, 890 (9th Cir. 1978), a new trial should be granted in negligent nondisclosure cases "wherever the nondisclosed evidence might reasonably have affected the jury's judgment on some material point."

In this case, the jury knew of Lowell's agreement with the prosecutor to testify at the criminal trial; the only undisclosed evidence relates to the separate civil agreements. The central question, then, is whether knowledge of the existence of the civil agreements would reasonably have affected the jury's judgment of Lowell's credibility, [3] in light of their knowledge of the existence of an agreement in the criminal trial.[4] We believe that it would not. If such knowledge would have had any impact at

all, it would have served to bolster Lowell's credibility, not to undermine it. [5/]

This case is quite different from Giglio v. United States, 405 U.S. 150 (1972) (prosecutor failed to disclose government promise of leniency in return for testifying), and from Napue v. Illinois, 360 U.S. 264 (1959) (prosecutor failed to correct witness' lies about existence of agreement he had with government), where a new trial was granted.

In conclusion, the trial court did not abuse its discretion. The denial of the motion for new trial based on newly-discovered evidence is

AFFIRMED.

The Memorandum having been amended, the Petition for Rehearing and Suggestion of Rehearing En Banc is otherwise denied.

FOOTNOTES

1/ Defendants unsuccessfully sought relief on direct appeal, United States v. Weiner, 578 F.2d 757 (9th Cir.), cert. denied, 439 U.S. 981 (1978). Defendants then moved for a new trial based on newly-discovered evidence. The district court denied the motion, and defendants appealed. This court, by Memorandum Decision in United States v. Lichtig, Nos. 79-1527 and 79-1529 (August 25, 1980), affirmed in part and remanded for an evidentiary hearing on one of the questions raised. After a full evidentiary hearing, the district court once again denied the motion for new trial. Defendants appeal.

2/ Under these civil agreements, Lowell was required, inter alia, to provide to the civil plaintiffs information

concerning Equity Funding's activities and to appear in judicial proceedings for the civil plaintiffs' benefit.

3/ We may assume that appellants are correct in asserting that Lowell's credibility was a "material point" for purposes of the Butler test.

4/ Cf. Thomas v. Cardwell, 626 F.2d 1375, 1382 (9th Cir. 1980), cert.denied, 449 U.S. 1089 (1981) (test utilized was whether, in light of already-conflicting testimony about the existence of an agreement to testify, jury's judgment of a witness' credibility would have been diminished any more than it already was).

5/ The civil agreements, by freeing Lowell from potential monetary liability, removed an incentive he might have had

to misrepresent his own involvement in and knowledge of wrongdoing.

APPENDIX F

FILED
August 8, 1983
Phillip B. Winberry
Clerk, U.S. Court
of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JULIAN S.H. WEINER, Defendant-Appellant.	No. 82-1282 D.C. No. 13390-17 JWC ORDER

Before: SKOPIL, NELSON and CANBY, Circuit Judges.

Appellant's motion to correct amended memorandum and reconsider denial of petition for rehearing and suggestion for rehearing in banc is DENIED.